LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
SEP 30 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

---

# No. 93

---

IRVING FEINER,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF NEW YORK

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

---

## BRIEF FOR PETITIONER

---

SIDNEY H. GREENBERG,
*Attorney for Petitioner,*
*Office & P. O. Address,*
*715 State Tower Bldg.,*
*Syracuse 2, New York.*

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutes and Information Involved | 2 |
| Statement of the Case | 3 |
| Specification of Errors to be Urged | 6 |
| Argument: | |
| I. The Conviction of the Petitioner Abridges the Basic Constitutional Rights of Freedom of Speech and Assembly Guaranteed by the First and Fourteenth Amendments of the United States Constitution and Squarely Conflicts with the Binding Decisions of the United States Supreme Court | 7 |
| A. Causing a crowd to congregate at the corners of Harrison and South McBride Streets in the City of Syracuse, New York | 9 |
| 1. The Petitioner had a right to hold a street corner meeting | 9 |
| 2. There was no serious interference with traffic | 10 |
| 3. The conduct of the crowd did not make the meeting unlawful | 15 |
| 4. Petitioner's failure to stop speaking on request of the Police is not unlawful | 24 |
| 5. The action of the police was not justified by clear and present danger | 25 |
| B. "And did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others." | 28 |
| 1. Petitioner's use of a loud speaker system is not unlawful | 28 |

Page

C. Use of insulting and derogatory remarks concerning public officials 30
1. Petitioner's words were not unlawful 30
2. Petitioner's counseling of a course of action is not unlawful 33
II. The Trial Court Erroneously Interpreted the Evidence and the Applicable Constitutional Principles 35
A. The Trial Judge erroneously interpreted the rule of clear and present danger 35
B. The Trial Judge drew unwarranted conclusions from the evidence 37
1. The conclusion of the Trial Judge that Petitioner advocated violence and racial strife is unsupported 37
2. The Trial Judge made freedom of speech subject to convenience and wishes of others 38
C. The Trial Court held a provocative speech to be unlawful 39
D. The Trial Judge permitted his own beliefs to control his decision 41
III. The Court of Appeals' Decision is Based Upon Unsupported Findings and Incorrect Interpretation of the First and Fourteenth Amendments 42
A. Petitioner's intent was improperly inferred 42
B. Petitioner's guilt may not be determined abstractly 43
C. Failure to cease speaking at request of police was not unlawful 45
D. The conduct of the crowd did not make petitioner's speech unlawful 45

Page

E. A provocative speech is not unlawful ... 48
F. Motives of Police are immaterial ... 48
G. The Court was wrong in using the judgment of the police officers as a test ... 51
H. The Court applied the rule of clear danger rather than clear and present danger ... 53
IV. Section 722 of the Penal Law of the State of New York as Applied to the Petitioner, Fails to Provide an Ascertainable Standard of Guilt in Violation of the Fourteenth Amendment of the Constitution of the United States ... 54
Conclusion ... 56

## Cases Cited

*Board of Education* v. *Barnette*, 319 U. S. 624, 642 ... 20, 24, 40, 44, 48
*Bridges* v. *California*, 314 U. S. 262 ... 9, 21, 26
*Cantwell* v. *Connecticut*, 310 U. S. 296 ... 8, 29, 31, 34
*Chambers* v. *Florida*, 309 U. S. 227, 241 ... 58
*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 ... 32
*Connally* v. *General Construction Co.*, 269 U. S. 385 ... 55
*Craig* v. *Harney*, 331 U. S. 367, 373 ... 21, 53
*DeJonge* v. *Oregon*, 299 U. S. 353, 365 ... 20, 34
*Gitlow* v. *New York*, 268 U. S. 652 ... 33
*Hague* v. *C.I.O.*, 307 U. S. 496, 512 ... 7, 8, 29
*Hartzel* v. *U. S.*, 333 U. S. 680 ... 54
*Herndon* v. *Lowry*, 301 U. S. 242, 258 ... 55
*Lanzetta* v. *New Jersey*, 306 U. S. 451 ... 55
*Lovell* v. *Griffin*, 303 U. S. 444, 450 ... 7, 29
*Martin* v. *City of Struthers*, 319 U. S. 141, 151 ... 57
*Murdock* v. *Pennsylvania*, 319 U. S. 105, 116 ... 8, 24
*Pennekemp* v. *Florida*, 328 U. S. 331 ... 32, 54
*Saia* v. *New York*, 334 U. S. 558 ... 8, 28
*Schenck* v. *U. S.*, 249 U. S. 47 ... 9, 13, 51
*Schneider* v. *Irvington*, 308 U. S. 147, 161 ... 43

Page

*Sellers* v. *Johnson*, 163 F. 2nd 877 ..... 22, 52
*Small* v. *American Sugar Refining Co.*, 267 U. S. 231 ..... 55
*Stromberg* v. *California*, 283 U. S. 359, 365 ..... 55
*Terminello* v. *City of Chicago*, 337 U. S. 1 ..... 21, 35, 55
*Thomas* v. *Collins*, 323 U. S. 516, 530 ..... 10, 21
*Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96 ..... 44
*United States* v. *C.I.O.*, 355 U. S. 104 ..... 55
*United States* v. *Cohen Grocery Co.*, 255 U. S. 81 ..... 55
*Whitney* v. *California*, 274 U. S., 357, 377 ..... 13, 27, 53
*Winters* v. *New York*, 333 U. S., 507, 514 ..... 55, 56

STATUTES, CONSTITUTION AND ARTICLES

Constitution:

First Amendment ..... 4, 6, 55
Fourteenth Amendment ..... 4, 6, 55

Judicial Code, as amended, Section 237 (b) ..... 1
Penal Law of the State of New York, Section 722, ..... 2, 3, 6, 9, 28
Cardozo, The Nature of the Judicial Process 92 (1921) ..... 58
Columbia Law Review, 49; 8:1118 (1949) ..... 23
Harvard Law Review, 61, 537, 539 (1948) ..... 22
Harvard Law Review, 52, 320, 321 (1938) ..... 22

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1950**

# No. 93

IRVING FEINER,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR PETITIONER

### Opinions Below

The opinion of the Court of Appeals is reported in 300 N. Y. 391. The opinions of the Trial Court and of the County Court of Onondaga County have not been reported and are contained in full in the Record, pages 136 and 145.

### Jurisdiction

The jurisdiction of this Court rests under Section 237 (b) of the Judicial Code as amended by the act of June 25, 1948,

62 Stat. 992 (Title 28, Sec. 344 (b) U. S. Code, as amended).

The petition for a writ of certiorari was granted on May 29, 1950 (R. 163).

## Statutes and Information Involved

(a) The information with which the petitioner was charged in the Court of Special Sessions of the City of Syracuse, New York is as follows (R. 15):

> "You are charged by Dennis Flynn, Police Officer, that on the 8th day of March, 1949 in the City of Syracuse, New York, you did wilfully and unlawfully violate subdivision 2 of Section 722 of the Penal Law of the State of New York in that you did act in such a manner as to annoy, disturb, interfere with, abstruct and be offensive to others, by then and there provoking and causing a breach of the peace, by causing a crowd to congregate at the corners of Harrison and S. McBride Streets in the City of Syracuse, New York, and did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others, and in addition, did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere."

(b) Section 722 of the Penal Law of the State of New York, insofar as here applicable:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd."

## Statement of the Case

The petitioner was charged in the information with the commission of an offense against the State of New York, Section 722 of the Penal Law of the State of New York. After arraignment and plea, petitioner moved before trial to dismiss the information upon grounds of constitutional and legal invalidity (R. 1). The motion to dismiss was denied by the Court of Special Sessions without opinion (R. 15).

The trial took place before Hon. William H. Bamerick, Justice of the Court of Special Sessions of the City of Syracuse, New York, without a jury, on May 5, 6 and 9, 1949. Motion for a dismissal of the Information on constitutional grounds was made at the close of the People's case and denied (R. 67). The same motion was made at the close of the entire case with the same ruling (R. 130). The Court found the petitioner guilty and sentenced the petitioner to imprisonment for a period of thirty (30) days on May 9, 1949. Upon application to the County Court of the County of Onondaga, New York, petitioner was admitted to bail in the sum of One Thousand ($1,000.00) Dollars, pending the determination of the appeal to the County Court. The County Court affirmed the judgment of conviction on August 5, 1949 after hearing argument raising questions under the First and Fourteenth Amendments to the United States Constitution, and an order was entered thereon on August 8, 1949. Notice of Appeal to the Court of Appeals was filed on August 16, 1949, pursuant to an order made on August 15, 1949 by Hon. Edmund H. Lewis, Associate Judge of the Court of Appeals, certifying the matter to the Court of Appeals, after hearing argument on a petition raising the

First and Fourteenth Amendments to the United States Constitution. The petitioner was admitted to bail pending appeal to the Court of Appeals in the sum of One Thousand ($1,000.00) Dollars, by an order of Judge Lewis, made on August 17, 1949.

The cause was submitted to the Court of Appeals of the State of New York in January, 1950. A brief, raising constitutional questions was filed therewith. The decision of the Court of Appeals was rendered on March 2, 1950, unanimously affirming the judgment of conviction. Judgment was entered on March 2, 1950.

By an order of Judge Lewis, dated March 8, 1950, the bail of the petitioner was continued until April 3, 1950, pending the determination of an application for a writ of certiorari. The writ was granted on May 29, 1950. The petitioner is still continued on bail.

Petitioner's conviction arose out of a speech made by him in the early evening of March 8, 1949, at a street meeting at the corner of Harrison and So. McBride Streets in the City of Syracuse, New York, called and conducted under the auspices of the Young Progressives of America (R. 19). It was a protest meeting, to protest and criticize the cancellation of authorization previously granted to Mr. O. John Rogge, former Assistant U. S. Attorney General, to speak at a public high school (R. 125, 126), and at the same time, call to the attention of the people that, despite the cancellation, Mr. Rogge would speak that night, not at the high school, but at the Hotel Syracuse (R. 19, 26). This incident of the denial of the use of a public school by the local authorities, for a public address by a former high government official was used by the petitioner in his speech to illustrate the threat to civil liberties and the importance of vigilant defense of these liberties (R. 22, 25, 126).

It is undisputed that the meeting was lawfully called, and held for a lawful purpose. It is similarly undisputed that

the meeting, which lasted about thirty minutes, proceeded from beginning to end in a peaceful and orderly fashion. No violence, disturbance or disorder of any kind occurred.

The meeting terminated with petitioner's arrest, first for unlawful assembly, finally for disorderly conduct (R. 43). Petitioner submitted to arrest in an orderly manner, offered no resistance and closed the meeting (R. 43).

The only witnesses for the prosecution were the two arresting police officers. They testified in substance, that during the course of the meeting, petitioner characterized various public officials in uncomplimentary terms (R. 19); that the 15th Ward was run by corrupt politicians and that horse rooms were operating (R. 19); that the Negro people did not have equal rights and should rise up and fight for them (R. 25).

Both officers were in agreement that the crowd was orderly although there was some pushing and shoving but not to excess (R. 41). That there was muttering in the crowd (R. 19, 20) but that this meant that some appeared to be for the speaker and some against (R. 41); that some people, about 10 (R. 32) were required to walk in the road because of the crowd on the sidewalk, although none of the pedestrians complained to the police; that no complaints had been made by any persons in the crowd or in the neighborhood except three (R. 59); that neither of the officers had given any instructions either to the crowd or to the speaker, prior to the arrest, although both were present on the scene between twenty and thirty minutes (R. 36, 37); that the petitioner was asked twice to stop speaking, and got down from his stand voluntarily upon being told that he was under arrest, and that no more than two minutes had elapsed from the time of the first request made by the police officer (R. 43); and that at no time did the petitioner ask the Negroes to take action against white people (R. 42).

The material testimony of the police officers was sharply controverted by witnesses for the petitioner (R. 74, 76, 77, 84, 97, 100, 101, 102, 107, 110, 113, 114, 123, 125).

## Specification of Errors to Be Urged

1. The Court below erred in affirming the judgment of the Trial Court because:

(a) The petitioner's speech was protected by the First and Fourteenth Amendments; and

(b) The petitioner's speech was not delivered under such circumstances shown likely to create a clear and present danger of substantive evil.

2. The Court below erred in affirming the judgment of the Trial Court because:

(a) The prosecution failed to prove that the petitioner intended to provoke a breach of the peace or that there was an imminent breach of the peace under Section 722 of the Penal Law of the State of New York, in the context of the First and Fourteenth Amendments.

1. The speech was peaceful.

2. The audience was peaceful.

3. The traffic situation was not abnormal.

4. Petitioner's failure to accede to the request of the police to cease speaking was not unlawful.

3. The Court below erred in affirming the judgment of the Trial Court because:

(a) The Court accepted the erroneous interpretation of the clear and present danger rule and held a provocative speech to be unlawful.

(b) The Court accepted the finding of the Trial Court regarding the judgment and motive of the police officer, thereby erroneously making the petitioner's right to speak dependent on same.

(c) The Court did not disturb the ruling of the Trial Court that freedom of speech is dependent on other people's wishes and convenience.

4. The Court below erred in holding that the existence of a clear danger rather than a clear and present danger was sufficient to make petitioner's speech unlawful.

## ARGUMENT

### I. The Conviction of the Petitioner Abridges the Basic Constitutional Rights of Freedom of Speech and Assembly Guaranteed by the First and Fourteenth Amendments of the United States Constitution and Squarely Conflicts With the Binding Decisions of the United States Supreme Court.

The First Amendment, so far as material, provides that Congress "shall make no law abridging the freedom of speech or of the press." The Fourteenth Amendment extends this to the States and their subdivisions. *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Hague* v. *C. I. O.*, 307 U. S. 496, 512.

A breakdown of the Information reveals that the Petitioner is charged with "causing a crowd to congregate at the corners of Harrison and So. McBride Streets in the City of Syracuse, New York," and "talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others," and making "insulting and derogatory remarks concerning public officials in this community and elsewhere."

An examination of the testimony, and for the purposes herein required, but without admitting same, we will accept as true the testimony of the two police officers who were the only prosecution witnesses, reveals that the petitioner did cause a crowd to congregate, did speak over a loud speaker system, did annoy others, and did make derogatory remarks concerning certain public officials.

When measured against the clear mandate of the Constitution and the decisions of this Court, nothing unlawful has been proven. Holding a public meeting and addressing a crowd as such, does not constitute unlawful conduct. *Hague* v. *C. I. O.*, 307 U. S. 497. Talking over a loud speaker system is similarly lawful. *Saia* v. *New York*, 334 U. S. 558. "Plainly, a community may not suppress the dissemination of views because they are unpopular, annoying or distasteful." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116.

In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court said, at Page 310:

> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know it, at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state and even to false statements. But the people of this Nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy."

There is no escaping the fact that the Petitioner was exercising his constitutional right to speak on the streets of his community. Not only did he speak, but he spoke about things that mattered; things that would arouse and excite people, things that would cause them to take action to re-

move the evils about which he spoke. During the course of this speech, he undoubtedly irritated some of his hearers and since he spoke against the administration of the City of Syracuse, he undoubtedly annoyed and disturbed the police officers present on the scene.

The question is not the small annoyances and inconveniences, but is, as Mr. Justice Holmes laid down in *Schenck* v. *U. S.*, 249 U. S. 47, 52, "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Unfortunately, during the course of the meeting, there was a small amount of annoyance of a practical nature. There was some small inconvenience to pedestrian traffic. This Court has held in *Bridges* v. *California*, 314 U. S. 262:

> "Freedom of speech, though not absolute is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious and substantive evil that arises *far above public inconvenience, annoyance or unrest.*" (Emphasis ours.)

The charges will be taken up *seriatim.*

A. CAUSING A CROWD TO CONGREGATE AT THE CORNERS OF HARRISON AND SOUTH MC BRIDE STREETS IN THE CITY OF SYRACUSE, NEW YORK.

1. *The Petitioner had a right to hold a street corner meeting.*

Penal Law Section 722, Subdivision 4, reads:

> "By his actions cause a crowd to collect except when lawfully addressing such a crowd."

There is no dispute here that about seventy-five (75) people gathered on the above-mentioned corner to hear the Peti-

tioner speak through a hand microphone. (R. 18.) Reference is again made to *Hague* v. *C. I. O., supra,* wherein this Court stated:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

We concede that this Court has placed some limitations on the right of free speech, nevertheless, preference is always to be given "to the great indispensable freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530. See also *Bridges* v. *California, supra.*

2. *There was no serious interference with traffic.*

The testimony of the police indicates that "approximately ten people" were seen by them walking in the street because of the crowd on the sidewalk. (R. 32.) We contend that inconvenience caused to "approximately ten people", during the course of a thirty minute address, is far from a "serious and substantive evil."

On the subject of vehicular traffic, the record may be searched in vain for more than a passing reference. The record of the trial, containing some one hundred twenty-nine

(129) printed pages of testimony, contains, at pages 48 and 49, only the following reference to vehicular traffic:

> "Q. (By Mr. Kelly) I ask you whether the street was heavily traveled that night?
> A. (By Officer Cook) I don't recall that.
> Q. (By The Court) Tell what you did observe about the traffic?
> A. I observed there was traffic there, yes.
> Q. Was the volume of traffic large or small?
> A. As I recall, it was not heavy.
> Q. Do you recall anything else about the traffic situation that night?
> A. Well, as I drove on South McBride St. and went past this crowd, I had to slow down pretty near to a stop at that point.
> Q. (Mr. Kelly) When you came to that point was the street obstructed by pedestrians in the street?
> A. Yes.
> Q. When you slowed down did you give any signal?
> A. I tooted the horn a couple of times."

It should be noted that except for the above the record contains no reference to vehicular traffic; no illustration to show interference with vehicular traffic; not a single vehicle is named or referred to as being impeded in any way during the course of the thirty-minute talk, during which one or both of the police officers were present.

We further contend that so little was the inconvenience to any kind of traffic, vehicular or pedestrian, that both police officers found it unnecessary to give any instructions, or perform any act to improve the vehicular situation. Police Officer Flynn testified as follows on this subject at pages 36 and 37:

> "Q. (By Mr. Greenberg) Did you at any time ask the crowd to move away so that people could go through the crowd, or pedestrians could walk through?
> A. (By Officer Flynn) No.

Q. Did you at any time walk up to the defendant and tell him that traffic was being obstructed?

A. No.

Q. So that prior to the time you placed the defendant under arrest you gave no instructions either to the crowd or to the defendant or anyone else involved in this meeting?

A. That is right."

Police Officer Cook, at page 48, testified as follows:

"Q. (By Mr. Kelly) What if anything did you do relative to trying to make it possible for the people to go up and down the sidewalk?

A. (By Officer Cook) We did not do anything at the time."

Further significance is attached to this lack of action on the part of the police, by the complete omission of any complaint from any source as to the traffic situation.

At page 59, Officer Cook, who was present during substantially the entire course of the meeting testified as follows:

"Q. (By the Court) Did anyone come over and complain about not being able to use the sidewalk?

A. (By Officer Cook) No.

Q. (By Mr. Greenberg) You were in a Police car that night?

A. Yes.

Q. And the word, "Police" was on the side of the car?

A. Yes.

Q. And you were in uniform?

A. Yes.

Q. If anyone wanted to make a complaint, they could have come over across the street and talked to you without any trouble?

A. Yes."

Although the facts here, demonstrate that there was no interference with vehicular traffic and a small interference with pedestrian traffic, nevertheless, the conduct of the police officers, and their apparent concern for the traffic problem, would have been more credible had they found it necessary to perform one act, or give one word of instruction to anyone present on the scene to remedy any interference with traffic, that might have existed. That the police officers found it necessary to break up the meeting, rather than to perform their duty to facilitate the flow of traffic, is an inconsistency in their conduct that belies the laudatory motives they claimed to have.

Freedom of speech and of assembly become meaningless when lower courts, in applying the general rule that these freedoms are not absolute, are allowed to set up their own standards by which to circumscribe these freedoms. We do not contend that the Petitioner has an absolute freedom to hold a public meeting anywhere he pleases. We do not contend that he has an absolute right to conduct a public meeting in the middle of the busiest thoroughfare in the community, thereby disrupting vehicular traffic and the normal business affairs of the area. The Supreme Court has laid down the standards, contained in the "clear and present danger" doctrine, whereby this type of freedom of speech may be circumscribed. Where the line is drawn, will presumably be determined by the facts in each case.

As Justice Holmes said, "the question in every case is whether the words used are used *in such circumstances* . . . " (Emphasis ours) *Schenck* v. *U. S.*, 249 U. S. 47, 52; and as Justice Brandeis said in the *Whitney* case, 274 U. S. 357, 377, "only an emergency can justify repression," and as he said further at page 376, "to justify suppression of free speech . . . there must be reasonable ground to believe that the danger apprehended is imminent."

If, in this case, the line is drawn at a point where some ten people are compelled to walk in the roadway, and a police car is caused to "slow down" on approaching the intersection, then, for all practical purposes, freedom to hold a public meeting on the streets of the City of Syracuse has ceased to exist; the reasoning of the *Hague* case, the *Schenck* case and the *Whitney* case, tortured out of all semblance of their original meaning, and the whole line of cases in the Supreme Court, stemming from those decisions, have become of no moment.

We cannot deny that the assembling of a crowd to hear the petitioner speak, whether that crowd consists of seventy-five people, as the prosecution contends, or of twenty-five or thirty people, as opposing witnesses contend, will frequently discommode others in the community. Whether a pedestrian is compelled to push through the crowd, walk on the roadway, or cross to the other side of the street, does not materially alter the fact that this pedestrian is discommoded and inconvenienced in seeking passage over that portion of the sidewalk where the meeting is being conducted. Whether ten people are so discommoded, or twenty, is perhaps not a material isue. This Court has said:

> "Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case, the same preferred treatment that we gave freedom of religion in the *Cantwell* case; freedom of the press in the *Griffin* case and freedom of speech and assembly in the *Hague* case." *Saia* v. *New York*, 334 U. S. 558.

The same decision, at page 562, instructed the Courts to:

> "balance the various community interest in passing on the constitutionality of local regulations of the character involved here. But, in that process, they should

be mindful to *keep the freedoms of the First Amendment in a preferred position.*" (Emphasis ours)

Admitting then, the incidental interference with pedestrian traffic, and the non-existent interference with vehicular traffic, the meeting at which the petitioner spoke on the night of March 8, 1949, being an exercise of the right of free speech and of assembly, should have been given the preferred treatment to which Mr. Justice Douglas alluded above. That the courts below did not follow this rule will be seen from the subsequent discussion.

3. *The conduct of the crowd did not make the meeting unlawful.*

Under the charge of "causing a crowd to congregate," some attention must be given to the proof directed to the conduct of the crowd. Police Officer Flynn, at pages 19 and 20, testified as follows:

"Q. (By Mr. Kelly) Did you observe the temperament of the crowd?

A. (By Officer Flynn) Yes.

Q. What did you observe about that?

A. I observed that there was angry muttering throughout the crowd, and the crowd hampered the use of the sidewalk."

At pages 21 and 22 is the following testimony:

"Q. (By Mr. Kelly) What did you observe and hear as you mingled with the crowd?

A. (By Officer Flynn) I observed that there was pushing and shoving and I had trouble getting through some portion of the crowd—I also heard angry muttering, especially when the defendant continued to speak after I requested him to stop.

Q. Were there any persons that expressed disapproval of what he was saying?

A. When Mr. Feiner stated that the negro people did not have equal rights and should rise up and fight, one man came up and said to me, "if you don't get that 'son of a bitch' off, I will go over and get him off there myself."

And at page 23:

"Q. (By Mr. Kelly) Did you observe that there was unrest in the crowd?
A. (By Officer Flynn) Yes."

And at page 25:

"Q. (By Mr. Kelly) Were any remarks made by people in the crowd at that time?
A. (By Officer Flynn) Yes.
Q. And immediately following, what did you do?
A. At that time, when the gentleman came up and made the statement I testified to, I figured it had gone far enough so I went over to Mr. Feiner."

And after describing his attempt to stop the petitioner from speaking, at page 26:

"Q. (By Mr. Kelly) What was the condition of the crowd at that time?
A. (By Officer Flynn) They were all coming closer and getting around my neck to see what was going to happen.
Q. Was the crowd noisy?
A. No, quiet.

And at Page 41:

"Q. (By Mr. Greenberg) You say you heard angry muttering?
A. (By Officer Flynn) Yes.
Q. Will you describe that? What did they consist of?
A. Well, some of the remarks were for and some against Mr. Feiner.
Q. Did anyone do anything besides mutter?

A. Some of the crowd were pushing and shoving at that stage, *but not to excess.* (Emphasis ours)

Q. You did not regard it as a disturbance?

A. Not at the time, but we stepped in to prevent it from resulting in a fight. After all there was angry muttering and pushing."

At pages 49-51, Officer Cook testified as follows:

"Q. (By Mr. Kelly) You say you did mingle with the crowd that was assembled at this point?

A. (By Officer Cook) Yes. We walked through there.

Q. What did you observe as to the attitude of that crowd?

A. They were kind of restless.

Q. What were they doing?

A. They were kind of *more or less conversing about the speech* Mr. Feiner was making. (Emphasis ours)

Q. Any arguments going on?

A. Some were calm and some were not—they were discussing the speech pro and con.

Q. Any disorder there?

A. *Not that I know of.* (Emphasis ours)

Q. Tell us just what the crowd was doing?

A. Milling around back and forth—and a couple of times I heard someone say they did not see why they had to put up with that kind of stuff in the neighborhood.

Q. What happened to the pedestrians on the street?

A. They had to go around in the road—they could not get by on the sidewalk.

Q. Now you say the defendant made remarks about different City officials and Federal officials—Were there any other remarks made by anyone?

A. There was a fellow came by and Denny was talking to him—we were listening to the speaker at the time.

Q. What did he say?

A. He said, "if you don't take that son of a bitch off there, I will take him off myself."

Q. What was the general attitude of the crowd at that time?

A. They were *getting to the point where they would be unruly.* (Emphasis ours).

Mr. Greenberg: I object to that as not binding on the defendant.

The Court: Yes, he ought to be more specific than that. I will sustain the objection.

Q. (By Mr. Kelly) About the time that remark was made what was the crowd doing then?

A. (By Officer Cook) *They were listening to the speaker.* (Emphasis ours)

Q. What else were they doing?

A. I don't understand what you mean.

Q. Were they moving about or jostling or disturbing anybody?

A. They were obstructing the sidewalk."

Also at page 52:

"The Court: Objection is sustained to that question —What else was said officer, that you can recall?

A. (By Officer Cook) I know he said the negroes should rise up in arms and fight for their rights.

Q. (By Mr. Kelly) That statement was made by the defendant, Feiner?

A. Yes.

Q. Was that the time you and Officer Flynn went over to talk to the defendant?

A. It was shortly after that.

Q. Did you notice the attitude of the crowd after that statement was made?

A. Yes, they seemed to mill around a little then.

Q. Were they as well behaved after that remark as they were before?

A. It stirred up a *little excitement.*" (Emphasis ours)

At page 60:

> "Q. (By Mr. Greenberg) Now, you say when you walked through the crowd, some people seemed to be in favor of the speaker and some against him?
> A. (By Officer Cook) That is the impression I got.
> Q. Did anyone start any fight?
> A. I did not *see any fight, no.*" (Emphasis ours)

It would be useful to review briefly the setting against which the petitioner spoke on March 8th. His organization, Young Progressives of America, had booked O. John Rogge into the public auditorium at Madison School for a speech, part of which would describe the case of six Negro boys who had been condemned to death for a crime of which Mr. Rogge, among others, claimed they were innocent. That permit had been cancelled the afternoon of the meeting by the Board of Education. The petitioner spoke at a public street meeting, designed not only to advise of the change in plans, whereby Mr. Rogge would speak at the Hotel Syracuse that night, but also to express his displeasure with the action taken by the public authorities in cancelling the permit for the public auditorium in Madison School. (R. 78)

We cannot deny that petitioner was outraged by this act. We cannot deny that he attempted to convey this feeling of outrage to his hearers, to parallel the cancelling of the permit with the unequal treatment given to Negroes in many areas. Obviously, his intent was to arouse his audience, to stir them up, to urge upon them a course of action that would prevent a recurrence of the peremptory cancellation of the permit, and help in the fight for equal rights for Negroes. That he was successful in exciting the crowd is a tribute not only to the soundness of his sentiments, but also to his effectiveness as a public speaker. That he annoyed some of his listeners and caused them to display their annoyance by mild vocal eruptions is not

surprising. Less surprising is the fact that he annoyed the police officers present. The petitioner did not appear at this public meeting to discuss the solar system, flowers or stamp collecting. He spoke on a provocative subject that mattered a great deal to him. He fully hoped and expected that his words would reach a warm response. He fully anticipated that some would disagree with him. As Mr. Justice Jackson stated so eloquently in *Board of Education vs. Barnette*, 319 U. S. 624, 642; ". . . but freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

The preceding is not intended to be brazen or flippant. It is intended to bring the conduct of the petitioner and his words, and the conduct of the crowd, down into the bedrock of the constitutional guarantees encompassing all the acts and words of the petitioner and of the crowd on the night of March 8th.

> "As Chief Justice Hughes wrote in *DeJonge* v. *Oregon*, 299 U. S. 353, 365, 'It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though

not absolute, (*Chaplinsky* vs. *New Hampshire*, *supra*) is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest. See *Bridges* vs. *California*, 314 U. S. 252, 262; *Craig* vs. *Harney*, 331 U. S. 367, 373."

Mr. Justice Douglas, for the majority, in *Terminiello* vs. *Chicago*, 337 U. S. 1.

"History has not been without periods when the search for knowledge alone was banned. Of this, we may assume, the men who wrote the Bill of Rights were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free Trade in ideas', *means free trade in the opportunity to persuade to action, not merely to describe facts.* Indeed, the whole history of the problem shows it is to the end of preventing action, that repression is primarily directed, and to preserving the right to urge it that the protections are given." (Emphasis ours.)

Mr. Justice Rutledge, for the majority, in *Thomas* vs. *Collins*, 323 U. S. 516, 537.

Assuming, for the purpose of this discussion, that the conduct of the crowd is the petitioner's responsibility, not one bit of evidence is revealed from the detailed excerpts from the record above recounted, to show that the conduct or the temper of the crowd even remotely approached that in the *Terminiello* case, *supra*. No outeries, no violence, no serious complaints, no threats, no disorder, in fact, nothing to distinguish the crowd that congregated at the corner of So. McBride Street and Harrison Street in the City of Syracuse on March 8, from most crowds which as-

semble peaceably to hear a speaker; merely a timorous police officer, who, "figured it had gone far enough." (R. 25).

We concede that there was one threat of violence. Not by the petitioner, but by one man in the audience who approached one of the police officers and said, "If you don't get that 'son of a bitch' off, I will go over and get him off there myself." (R. 22). The duty of the police officer, at that moment, was clear. It was his duty at the very least, to reprimand the protestor and send him on his way, so that violence would be avoided, or, if necessary, to arrest him for threatening violence and threatening to take the law into his own hands. Threatening violence is a well-defined crime in the State of New York, covered by the same statute under which petitioner was convicted. Except in self defense, violence or threats of violence, are criminal acts, punishable under the law. Yet, the only duty the police officer saw, at that moment, as appears from the testimony at page 25, was, "at that time, when the gentleman (sic) came up and made the statement I testified to I figured it had gone far enough, so I went over to Mr. Feiner." One may well question whether, under the law, so far laid down in this case, freedom to speak has become the crime, and freedom to threaten violence lawful.

If the authorities fail in their duty to maintain peace and inadequately control (*Sellers* v. *Johnson* 163 F. 2d 877; 8th Cir. 1947), connive at, or actively encourage (*Hague* v. *CIO*, supra) the disruptive elements, they may not justify intervention to "preserve" order, by pointing to a danger which they have helped to bring about. Cf. 61 Harvard Law Review 537, 539 (1948); 52 Harvard Law Review 320, 321 (1938).

See also Mr. Justice Jackson dissenting in *Terminiello* v. *City of Chicago*, 337 U. S. 1, 34; "I do not think that the

Constitution of the United States denies to the states and the municipalities power to solve that problem in the light of local conditions, at least so long as danger to public order is invoked in bad faith, as a cover for censorship or suppression."

We are impelled to inquire whether it is criminal to speak in such a manner that the audience will be interested to discuss, one with the other, some for, some against. (R. 41). Whether it is criminal to speak to a crowd that pushes and shoves, but not to excess. (R. 41). Whether it is unlawful to speak to an audience that, "mills around back and forth." (R. 50). Whether it has become a crime to speak to an audience that discusses the speech pro and con without disorder. (R. 49). Or to a crowd that is restless, (R. 49) or to speak in such a manner that, "stirs up a little excitement." (R. 53).

A thoughtful postulation of the problem of the hostile audience as related to freedom of speech and assembly is found in 49 Columbia Law Review 8:1118 (1949). Since we do not subscribe to the conclusion that the audience here was hostile or presently or imminently violent, except in the minds of the Courts below, this discussion may bear no more than an academic relation to the case at hand. However, if this Court should find that some hostility of the audience has been proved, we assert that the degree of hostility here shown falls far short of that necessary to suppress the petitioner's right of free discussion. Whether a hostile audience may, under some circumstances, disturb this right, we express no opinion.

We surmise that it was not the conduct of the crowd, or the conduct of the petitioner, or his words, as such, that brought about his arrest; we suspect it was the unpopularity of his views, and the annoyance created by them in the minds of the police officers that caused his arrest.

This Court has long enjoined the suppression of unpopular, minority views.

> "Plainly, a community may not suppress . . . the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes, but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116.

This Court has also held that the freedoms guaranteed by the First Amendment, to the extent that they are denied to one, are denied to all. This Court has said that the Constitution does not command orthodoxy of opinion, whether the issue be religious, political, economic or social. The intention is rather, to keep the channels of information and opinion completely open, however distasteful or even odious the views expressed may be to the prevailing opinion of the times.

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil men . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Board of Education* v. *Barnette*, 319 U. S. 624, 640.

4. *Petitioner's failure to stop speaking on request of the Police is not unlawful.*

Much has been made of the fact that the petitioner did not immediately respond to the request of the police officer to cease his talking. The police testified that it was necessary to request him to stop several times before placing him

under arrest. This incident may have taken two minutes, as testified to by Officer Flynn (R. 43) or four or five minutes as testified to by Officer Cook (R. 64), or about a minute as testified to by the petitioner's witnesses (R. 127). We can see no useful purpose in endless debate on this subject. If petitioner's conduct was lawful, the police officers had no right to break up his meeting. Whether they broke up the meeting by forcing him to cease his talk or by arresting him, is an evasion of the fundamental principles involved here. If the petitioner had a right to speak, then the police officers had no right to terminate the meeting, whether by request, by demand, by threats, or by arrest. He is charged with causing a crowd to congregate and speaking in an unlawful manner. He either had a right to speak as he did, or he had none. If he had that right, then he could not be interfered with either by request or by arrest. If he had no right to speak, then he was liable to arrest, whether he took two minutes or four minutes to submit.

That the police officers themselves were doubtful as to the correctness of their actions, is evidenced by their own statement that they originally arrested the petitioner for unlawful assembly and later changed the charge to disorderly conduct (R. 43). That their action was highly speculative is further shown by the police officer's testimony at page 41, wherein he said, after denying that there was a disturbance: "But we stepped in to prevent it from resulting in a fight. After all, there was angry muttering and pushing"

5. *The action of the police was not justified by clear and present danger.*

If the action of the police officers is to be justified at all, it is on the basis of preventing an imminent breach of the peace, caused by the words and conduct of the petitioner. The petitioner's speech and conduct will be discussed later.

Whether a breach of the peace was imminent may be determined only from the testimony we have set forth above, describing the conduct of the crowd. We submit that a police officer may not assume that a breach of the peace will occur because the speakers remarks are provocative, sufficiently so to cause the audience to discuss same "pro and con" (R. 49); or because there is a little, "pushing and shoving" (R. 41); or because there are two or three complaints (R. 25). If the police may adopt this line of reasoning, then no speaker is safe from censorship at the hands of a police officer who fears provocative discussions; who fears novel and unpopular views and who fears criticism of himself or of his superiors.

The police, as well as private citizens, are bound by the dictate of this Court, as enunciated in the "clear and present danger" doctrine. Obviously, police officers need not wait until a breach of the peace has occurred before acting. Nevertheless, if they act before the breach has occurred, they should be prepared to justify their actions under the rule of "clear and present danger."

In our view, a discussion of "clear and present danger" in this case, may be academic. A review of the testimony reveals that during the entire course of petitioner's talk, on the night of March 8, there was no "clear and present danger" of anything other than a modest amount of pedestrian inconvenience, and annoyance to a small group of dissenters.

A discussion of "clear and present danger" must relate to a "substantive evil." (*Bridges v. California*, 314 U. S. 252, 262)

> "In order to support a finding of clear and present danger, it must be shown either that immediate, serious violence was to be expected, or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated . . . To courageous,

> self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." Concurring opinion of Justices Brandeis and Holmes, *Whitney* v. *California*, 274 U. S. 357, 377.

The testimony of the police officers, when measured against the definition of "clear and present danger" as laid down by this Court, reveals that the "clear and present danger" doctrine, as we have said, has no place in this case. This was a public meeting, peaceful from beginning to end. Dissenters? Admittedly. Complainers? Yes. Violence? No. Disturbance? No. Merely the opinion of the police officer that, "it had gone far enough" (R. 25).

To summarize, under that portion of the charge devoted to, "causing a crowd to congregate at the corner of Harrison and South McBride Streets in the City of Syracuse, New York," the record is barren of any act by the petitioner, or any acts on the part of the "crowd" to take the charge outside the language of Subdivision 4 of Section 722 of the Penal Law of the State of New York; "by his actions, cause a crowd to collect, except when lawfully addressing such a crowd." Nothing unusual, nothing untoward, except the opinion of the police officers that, "I figured it had gone far enough" (R. 25); that, "they were kind of restless" (R. 49), and "they were getting to the point where they would be unruly" (R. 50). Under the Constitution and the binding decisions of this Court, this portion of the charge has not been sustained.

B. "AND DID ACT IN SUCH A MANNER BY TALKING OVER A LOUD SPEAKER SYSTEM AS TO ANNOY, DISTURB, INTERFERE WITH AND BE OFFENSIVE TO OTHERS."

1. *Petitioner's use of a loud speaker system is not unlawful.*

Section 722 Subdivision 2 of the Penal Law of the State of New York, reads as follows:

> "Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

We do not deny that the petitioner made use of loud speaking equipment. It is conceded that his entire speech was delivered over a public address system. Except that the petitioner spoke in a loud, high-pitched voice (R. 25), there is nothing in the record specifically referring to the loud speaking equipment, except that he used same, and a description of same. As to his use of the loud speaker system to, "annoy, disturb, interfere with and be offensive to others," there is a complete absence of proof. We have previously conceded that his words undoubtedly caused annoyance to a portion of his audience, but whether this annoyance resulted from the words themselves, or the fact that they were broadcast over a public address system, is not made clear in the record. There is no proof that any of the residents of the area were annoyed, disturbed or interfered with by the use of loud speaking equipment, nor passersby, nor anyone.

This Court has said that, "any abuses which loud speakers create can be controlled by narrowly drawn statutes." *Saia* v. *N. Y.*, 334 U. S. 558. Section 722, Subdivision 2, can hardly be considered such a narrowly drawn statute. If this statute can be applied to the use of loud speaking equip-

ment, then there is sanctioned, "a device for suppression of free communication of ideas." *Saia* v. *N. Y.*, *supra*.

This statute, in the use of language, "to annoy, disturb, interfere with, obstruct or be offensive to others" is similar to the language of the statute struck down in the *Saia* case. There, the statute read, "it shall be unlawful for any person to maintain and operate . . . a loud speaker . . . which is so placed . . . that the sounds coming therefrom can be heard to the *annoyance, or inconvenience* of travellers, upon any street or public places or of persons in neighboring premises." (Emphasis ours.)

This Court, in finding this ordinance unconstitutional said:

> "For it establishes a previous restraint on the right of free speech, in violation of the First Amendment, which is protected by the Fourteenth Amendment against State action. To use a loud speaker or amplifier, one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places or use of loud speakers or the volume of sound to which they must be adjusted. The ordinance, therefore, has all the vices of the ones which we struck down in *Cantwell v. Connecticut*, 310 U. S. 296; *Lovell v. Griffin*, 303 U. S. 444; and *Hague v. CIO*, 307 U. S. 496."
>
> "The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine."

Though no permit is required in Section 722, nevertheless, the sanction of the police appears to be a necessary adjunct to the use of loud speaking equipment in this case. Let the police decide that the petitioner is using the loud

speaker system as to, "annoy, disturb, interfere with and be offensive to others," and arrest, conviction and lengthy appeal follow.

Like the first portion of the charge, "causing a crowd to congregate," the second portion, devoted to the use of loud speaking equipment, can hardly be sustained under the Constitution.

C. USE OF INSULTING AND DEROGATORY REMARKS CONCERNING PUBLIC OFFICIALS.

1. *Petitioner's words were not unlawful.*

The third and last portion of the charge states, "did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere." Section 722, Subdivision 1, states:

> "Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior."

The testimony of the police officers accuses the petitioner of making the following remarks:

> "He was speaking in regard to John Rogge and the talk he was going to give later that night. He called Mayor Costello a champagne sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents. He also said the Fifteenth Ward was run by corrupt politicians and that horse rooms were operating". (R. 19).

also that, "The negro people do not have equal rights and should rise up and fight" (R. 22, 25, 42, 47, 52).

Petitioner's witnesses have denied that the petitioner made the remarks about Mayor Costello and President Truman ascribed to him by the police. However, for the

purpose of this discussion, but without admitting the truth of these accusations, we are willing to accept as true the proof offered by the police.

Admittedly, making reference to the Mayor as a "champagne sipping bum," and to President Truman as a "bum", is in extremely bad taste, and ineffective political campaigning. None the less, this Court has held language of this kind is not actionable on the part of the community. The leading case on this subject is *Cantwell* v. *Connecticut*, 310 U. S. 296. There, the defendant accosted two men on the street and played a record attacking all organized religion. He then singled out the Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of his fellows. The hearers were in fact, highly offended. One of them said he felt like hitting the defendant and the other that he was tempted to throw the defendant off the street. The Court there said:

> "The defendant's conduct, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may be guilty of the offense if he commits acts or makes statements likely to provoke violence or disturbance of good order, even though no such eventuality be intended.
>
> "Decisions to this effect are many, but examination discloses that, in practically all cases, the provocative language which was held to amount to a breach of the peace, consisted of profane, indecent, or abusive remarks directed *to the person of the hearer.*" (Emphasis ours.)
>
> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know it, at times resorts to exaggera-

tion, to *vilification of men who have been, or are prominent in church or state and even to false statements.* But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy." (Emphasis ours.)

*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, laid down the rule that "fighting words" made directly to the face of the hearer, was actionable. "Fighting words" was defined as "what men of common intelligence would understand, to be words likely to cause an average addressee to fight . . . Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic, of plainly tending to incite the addressee to a breach of the peace . . . The statute as construed, does no more than prohibit the face to face words plainly likely to cause a breach of the peace by the addressee."

There is, of course, no proof that either Mayor Costello or President Truman were in the audience on the night of March 8th. In their absence, neither police officers nor private citizens are permitted to take up the cudgels on their behalf by causing the petitioner's arrest for making the alleged remarks.

This Court has held in *Bridges* v. *California*, *supra*, and *Pennekemp* v. *Florida*, 328 U. S. 331, that the publishing of derogatory remarks about the judge and jury did not create such a "clear and present danger" to the administration of justice as to permit punishment for contempt. This Court further stated ". . . that unless the writing precipitates a clear and present danger, in consequence of which justice will be affected, recourse of the aggrieved person is prosecution for libel."

2. *Petitioner's counseling of a course of action is not unlawful.*

The above discussion has no relevance to the petitioner's urging upon his audience, "to rise up and fight," or "rise up in arms and fight," for equal rights for Negroes. No apology need be made for so typically an American phrase as that. To construe this exhortation as an attempt to incite to riot or to counsel direct physical action by one race against the other or against duly constituted authority, is logic born out of hysteria, not reason.

Police Officer Flynn's answer to the question; "Did he at any time ask the Negro people to take action against the white people as such?" was "No, I did not hear him ask anything like that" (R. 42).

We have previously urged that the speech made by the petitioner on the night of March 8th was sharp, vigorous and designed to effect a course of action. Unlike the defendant in the *Terminiello* case, he did not vilify race and religion. He related what is a well-known circumstance in many areas of this country, that Negro people are discriminated against. He advised a course of action to help eliminate this discrimination. At no time did he urge Negro people to take action against white people. To counsel and advise action is not unlawful. "Free trade in ideas means freed trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, *supra*.

That ideas which induce listeners to action are constitutionally protected was voiced in one of Justice Holmes' dissents later to become the majority view of this Court in *Thomas* v. *Collins*, *supra*; "every idea is an incitement. It offers itself for belief, and, if believed, it is acted on, unless some other belief outweighs it, or some failure of energy stifles the movement at its birth." *Gitlow* v. *N. Y.*, 268 U. S. 652.

In the absence of incitement to riot, quibbling over whether or not the petitioner used the language charged to him serves no useful purpose. No incitement was charged, none proven. Whether sound or unsound, temperate or intemperate, in good taste or in bad taste, whether vigorous or mild, the petitioner had a clear right, under the Constitution, so long as he escaped the injunction of the *Chaplinsky* case, to engage in free debate and free exchange of ideas, and certainly, at the very least, to use, in carrying out these ideas, the words with which he is charged. See *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Terminiello* v. *City of Chicago*, 337 U. S. 1.

We hold no brief for the right of anyone to use language connoting religious and racial bigotry. We do not espouse the cause of those who incite to riot. If this Court found the language in the *Terminiello* case, replete as it was with racial and religious bigotry, insufficient to uphold a conviction, if no incitement to riot were found in that case in the face of the turbulent conditions prevailing during the course of that speech, then how much less justification for a finding of unlawful language and incitement here.

This concludes our analysis of the charge and the testimony. We have sought to show that the basic charge against the petitioner, "in that he did then and there provoke and cause a breach of the peace," is completely bereft of proof. We have demonstrated that the supporting charges: "by causing a crowd to congregate," by "talking over a loud speaking system" and making "insulting and derogatory remarks" are not unlawful as such and were not made unlawful by the effect of these activities on those attending the meeting which took place on March 8th. Finding no breach of the peace at the meeting itself, the Courts below took refuge in the theory of imminent or possible breach of the peace. This theory, as applied by the Courts below, will be discussed in the next section of this brief.

## II. The Trial Court Erroneously Interpreted the Evidence and the Applicable Constitutional Principles

### A. THE TRIAL JUDGE ERRONEOUSLY INTERPRETED THE RULE OF CLEAR AND PRESENT DANGER.

The language of the Trial Court in ruling on the petitioner's motion to dismiss, at the end of the prosecution case, gives the key to its thinking on the standard of guilt employed here:

> "The basis of the action here, is not whether or not *disorderly conduct actually occurred*, but whether or not the circumstances furnished the occasion for a *possible* act or acts that would come within the classification of disorderly conduct." (Emphasis ours) (R. 71)
>
> ". . . the question is, whether or not, with this combination of circumstances, there was a possible occasion for a disorderly conduct as the officers appraised the situation there. I think that is the point here. If the combination of these things created a situation wherein the officers concluded that there was danger that a situation *might* arise that *could* involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try to avoid and head off any such development as that." (Emphasis ours) (R. 71)

Taking these words of the Trial Judge in the abstract, a vast difference can be seen between these words and the standard applied in *Bridges* v. *California*, *supra*, that "Freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious, substantive evil, that rises far above public inconvenience, annoyance or unrest." The Trial Judge's concern for a "possible act", that a situation "might arise", that "could

involve'' disorderly conduct, makes a shambles of the clear and present danger doctrine.

In marshalling the evidence in support of this theory, the Trial Judge, at the conclusion of the prosecution case, stated:

> ''The question is, whether the combination of circumstances there, the fact of the meeting (sic); the talk being delivered over the loud speaking apparatus, which in and of itself is perfectly proper; the attitude of the crowd as testified to by Officer Flynn; the angry muttering; the expression of this one man, who by that statement, indicated his attitude; and the remarks that the officers testified to that were overheard in this crowd.'' (R. 71)

These are the circumstances that transpired during the course of a thirty minute meeting on a street corner on March 8th. These are the acts for which the petitioner is held responsible and which led the Trial Judge to believe that a ''possible occasion for a disorderly conduct'' (R. 71) existed.

Enough discussion has preceded here, on the subject of ''angry muttering'' and the few expressions of dissent, so that further comment would be repetitious. Whether the ''angry muttering'' and the expressions of dissent would give rise to a breach of the peace, is highly speculative. To argue whether a speech resulting in ''angry muttering'' and expressions of dissent would end up peaceably or break up in a fight, makes a very interesting study in semantics. As a practical matter, a speech delivered to a sympathetic audience might have a peaceful result, the same speech delivered to a hostile audience might have a very unpeaceful result. The question then, is not whether the conduct of the listeners will give rise to a breach of the peace, but rather whether or not the words of the speaker will give rise to the breach. That they ''invite dispute . . . induce a condi-

tion of unrest, create dissatisfaction with conditions as they are, or even stir people to anger," *Terminiello* v. *City of Chicago, supra,* is no basis for suppressing that speech. The standards used by the Trial Judge, fall far short of this mandate.

B. THE TRIAL JUDGE DREW UNWARRANTED CONCLUSIONS FROM THE EVIDENCE

1. *The conclusion of the Trial Judge that Petitioner advocated violence and racial strife is unsupported.*

At the close of the entire case, and as part of his decision convicting the petitioner, the Trial Judge, discusses the substance of the petitioner's speech. He said:

> ". . . people who advocate change by violence and who divide a nation to conquer, and pit men against men, and class against class and race against race and color against color and religion against religion, should be denied the right of freedom of speech." (R. 137.)

And continuing:

> "I think that is a good, sound, sensible philosophy. I think our citizens should be permitted to exercise those liberties that Rabbi Friedman spoke about: the freedom of speech and the numerous other freedoms you have heard a good deal about, subject however, to some regard for the rights of others: *subject to other people's convenience; subject to other people's wishes.*" (Emphasis ours.) (R. 137.)

We have made a painstaking search of the record and have made references to many portions of it, so that the entire subject matter of the petitioner's speech, as testified to by the prosecutor's witnesses, might be clearly before this Court. We have found no word or phrase in the entire

record to indicate that the petitioner, either directly or by implication, advocated, "change by violence;" sought to "divide a nation to conquer;" pitted "men against men;" "class against class;" "race against race;" "color against color" and "religion against religion."

Notwithstanding our fear of becoming wearisome from repetition, the record discloses that the petitioner urged the Negroes in his audience to "fight for their rights." (R. 22, 25, 42, 47, 52), and that the petitioner did not counsel Negroes to act against whites (R. 42).

2. *The Trial Judge made freedom of speech subject to convenience and wishes of others.*

The Trial Judge's generous grant to the petitioner of the right of freedom of speech, "subject to other people's convenience; subject to other people's wishes," (R. 137) is a novel theory in our constitutional law. No purpose would be served in exploring it.

Near the conclusion of his decision, the Trial Judge sought to justify his theory that freedom of speech is, "subject to other people's convenience; subject to other people's wishes," by showing:

> ". . . that it was necessary for people attempting to pass up or down on that side of the street to go out into the roadway where vehicular traffic made it appear to the officers that some situation might result from that, whether dangerous or what, they noted that . . . They say there was pushing and muttering, indicating a state of unrest. They heard remarks from three different men in that group indicating a frame of mind which could be disturbing. They were asked as to how long you were going to be permitted to talk. One man came across the street and said to Officer Flynn, "if you don't get that so and so off there, I

will go over and get him down myself.'' The officers acted on these appeals at the last stage, after hearing you stress the inequalities and the unfair things you claimed you were disturbed about. They then heard you appeal to these people, to stand up and in arms or with arms and to fight.''

This, then, is the entire case against the petitioner. This, then, was the situation that, ''might arise that could involve disorderly conduct.'' (R. 71.)

These quotes from the trial Court's opinion are designed to show that the Trial Judge adopted, without material change, the theory of the police and of the prosecution. By police standards, a discussion of racial inequalities is unlawful. By police standards apparently, racial inequalities do not exist. We contend that it is common knowledge that racial inequalities exist and that they are not made to disappear by suppressing discussion of them. Racial inequalities are made to disappear only through full and free discussion which gives, ''the opportunity to persuade to action, not merely to describe facts.'' *Thomas* v. *Collins*, *supra*.

C. THE TRIAL COURT HELD A PROVOCATIVE SPEECH TO BE UNLAWFUL

One of the more disturbing conclusions of the Trial Court, chiefly because the Court of Appeals later adopted this conclusion as its own follows:

> ''I think that on the basis of the evidence here, that you *deliberately agitated* and that in every way that you could, you *goaded these officers* into action. They were right there on the opposite side of the street; you knew they were there . . . and you kept right on talking about *racial inequalities* with *this muttering; this angry muttering*. . . .'' (R. 140) (Emphasis ours.)

Whether the petitioner is charged with agitating his audience or agitating the officers is not clear. Unmistakably, he is accused by the Court of goading the officers to action, presumably because he continued to talk about racial inequalities while the "angry muttering" continued. This is truly an astounding conclusion.

It should be borne in mind first, that this "angry muttering" is no more than a pro and con discussion of the petitioner's speech. (R. 41.) The petitioner, while making a lawful speech, was not compelled to stop his speech because he succeeded in inducing "a condition of unrest," creating "dissatisfaction with conditions as they are" or even strirring "people to anger." *Terminiello* v. *City of Chicago*, *supra*. That he succeeded in evoking a sufficient response from his audience that they were impelled to discuss the speech between themselves pro and con is a tribute to his subject matter and to his skill as an orator. He was not compelled at that time to cease his talk or to change the subject to one of lesser moment. ". . . freedom to differ is not limited to things that do not matter much." *Board of Education* v. *Barnette*, 319 U. S. 624, 642.

Except insofar as the above is concerned, we find no support in the record for the conclusion that the petitioner "goaded the police officers to action." It was not the function of the police officers to be "goaded" one way or another. So long as the petitioner's speech was protected by constitutional guarantees, the subject matter thereof should have left the police officers cold. They were not present as members of the audience. The speech was not designed to influence them one way or another. That it irritated them, aroused them, or annoyed them, is not material. It was not their function to protect the audience from the doctrines espoused by the speaker.

> "The very purpose of the First Amendment is to foreclose public authority from assuming a guardian

> ship of the public mind through regulating the press, speech and religion. In this field, every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us." Concurring opinion of Mr. Justice Jackson in *Thomas vs. Collins*, 323 U. S. 516, 545.

Accordingly, it was not the duty or the right of the police officers to protect the audience from a discussion of racial inequalities, even though there was "angry muttering." Accordingly, their frustration at having to stand by while these ideas were being discussed, though it may be considered by the Trial Court to be "goading," is nevertheless nothing for which the petitioner may be held criminally responsible.

D. THE TRIAL JUDGE PERMITTED HIS OWN BELIEFS TO CONTROL HIS DECISION

Revealing also is the last paragraph of the Trial Judge's opinion:

> "I haven't much respect for the philosophy you endorse or for the remarks you made on that night in question. I think that talk of yours was designed to do the very things that Rabbi Friedman has spoken about; to line up class against class and race against race, and that philosophy of yours will never prevail in this country." (R. 141.)

Finding no support in the record that the petitioner's speech sought to "line up class against class and race against race," we conclude that, in the mind of the Trial Judge, a discussion of racial inequalities is tantamount to lining up "class against class and race against race." The conclusion is inescapable that in the mind of the Trial Judge, a public discussion of racial inequalities is unlaw-

ful. This philosophy needs to be struck down by this Court.

## III. The Court of Appeals' Decision Is Based upon Unsupported Findings and Incorrect Interpretation of the First and Fourteenth Amendments.

It is against the background of the evidence which we have incorporated in considerable detail in this brief, that the Court of Appeals' opinion should be examined. We will show that there is not only a wide divergence between the evidence in the record and the evidence as accepted by the Court of Appeals, but also a considerable divergence between this evidence and the conclusions drawn from it.

### A. PETITIONER'S INTENT WAS IMPROPERLY INFERRED

It was not until the case reached the Court of Appeals, that the question of petitioner's intent was considered. Introductory language of Section 722 reads as follows:

> "Any persons who, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts, shall be deemed to have committed the offense of disorderly conduct."

In the Trial Court, more attention was given to the possibility of a breach of the peace occurring, rather than to the intent of the petitioner to commit same. The Court of Appeals preferred to rely more heavily on the intent of the petitioner. Accordingly, the Court of Appeals, on the question of intent, stated:

> "The statement made by the trial judge to defendant that "on the basis of the evidence here . . . you deliberately agitated . . . and in every way that you could, you goaded these officers to action"

was clearly a finding that defendant, by his conduct under the circumstances, intended to provoke a breach of the peace" (R. 157).

Previous comment has been made by us on the subject of "agitating and goading" the officers to action. We do not feel bound to accept this finding of the Trial Judge, as the Court of Appeals did, since there is no support in the record for it. It is undeniable that the record discloses no agitation or goading of the police officers, and that, even if it does, nothing unlawful is proved thereby.

B. PETITIONER'S GUILT MAY NOT BE DETERMINED ABSTRACTLY

Coupled with the finding of intent, is the equally unsupported finding by the Court of Appeals:

> "Certainly, defendant acted, 'in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others,' within the meaning of Subdivision 2, and such conduct, in conjunction with an intent to provoke a breach of the peace, is sufficient in itself to establish the offense of disorderly conduct" (R. 157, 158).

This has also been commented on previously and requires no repetition. We submit that, even though the petitioner, in the abstract, acted, "in such a manner as to annoy . . . ," none the less, while speaking under the rights guaranteed him by the First and Fourteenth Amendments, Section 722 must give way. This Court, speaking through Mr. Justice Roberts in *Schneider* v. *Irvington*, 308 U. S. 147, 161, said:

> "This Court has characterized the freedom of speech and that of the press as fundamentally personal rights and liberties. The phrase is not an empty one and was not lightly used. . . ."
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the Courts should be

> astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at *other personal activities* but be insufficient to justify such as diminishes the *exercise of rights so vital to the maintenance of democratic institutions*" (Emphasis ours).

We assert, that, though acting, "in such a manner as to annoy . . ." may be criminal in some circumstances, it was not so here, in the light of the applicable constitutional guarantees. As Mr. Justice Murphy, in *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96 said:

> "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the Courts should 'weigh the circumstances', and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

The distinction was made explicit in Mr. Justice Jackson's opinion in *Board of Education* v. *Barnette*, 319 U. S. 624, 638, 639.

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. *The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect*" (Emphasis ours).

### C. FAILURE TO CEASE SPEAKING AT REQUEST OF POLICE WAS NOT UNLAWFUL

The Court of Appeals relies also on the fact that the petitioner refused "to accede to the requests of the police officer within the scope of his lawful authority . . ." (R. 158). Our earlier discussion has noted that the police officers had no more right to arrest the petitioner than to stop the meeting. Once it is conceded that the petitioner had a lawful right to speak at the street corner in question, and that his words did not exceed the bounds of lawful conduct laid down by this Court, it is immaterial whether the petitioner acceded to the requests of the police officer or not. The police have no right to break up a lawful meeting, whether by stopping the speaker or arresting him. No question of acceding to the request of the police officer is involved.

According to the arresting officer, his original purpose was "to get him to break the congregation up—that is the reason" (R. 42). Thus, had petitioner acceded forthwith, the officer's mission would have been accomplished. The ultimate arrest gives no greater sanctity to the officer's action. Obviously, the most direct means of placing in issue the validity of the request, is to refuse to honor it.

### D. THE CONDUCT OF THE CROWD DID NOT MAKE PETITIONER'S SPEECH UNLAWFUL

In support of its contention that the constitutional guarantees do not apply, the Court said: ". . . . we have a situation in which, on a public street, a portion of defendant's audience became enraged and aroused at his utterances" (R. 159). That they became aroused is not disputed; that they became enraged is open to serious question. Furthermore, reference need only be made to the language of the

*Terminiello* case *supra*, where it was held that a speech which "stirs people to anger" is not unlawful.

"The crowd became restless and potentially unruly" (R. 159). Again, that the crowd became restless is not denied; nor is it unlawful. That it was "potentially unruly," is open to doubt. The "unruly" character of the crowd is mentioned once in the entire record in the testimony of Police Officer Cook (R. 50). Objection to its competency was sustained on the ground that it was not sufficiently specific (R. 50), and it is not legitimately a part of the record.

The opinion goes on: "It filled the sidewalk and spilled out into the adjacent thoroughfare, obstructing and impeding both pedestrian and vehicular traffic" (R. 159). Ten pedestrians walked in the roadway (R. 32). There is nothing in the record as previously indicated, to show that any vehicular traffic was interfered with. The sole reference to vehicular traffic was in the testimony of Police Officer Cook, that when he arrived at the scene, he "slowed down pretty near to a stop" (R. 49). Nor does the record show that the crowd "spilled out into the thoroughfare." The listening audience was on the sidewalk (R. 20).

The Court of Appeals further concluded that "an imminent danger of a breach of the peace, of a disturbance of public order, *perhaps even of riot*, was threatened" (R. 155) (Emphasis ours).

We do not agree that the Court of Appeals had reason to fear a riot from a condition described by the police as an "angry muttering" (R. 20), meaning pro and con discussion (R. 41), and some pushing and shoving, but not to excess (R. 41), and one objector who threatened to take the law in his own hands (R. 22). Not even the Trial Court,

whose predisposition was quite apparent, felt it necessary to describe the events of March 8, in terms of a possible riot.

Not only riot, but "an eruption of civil strife," appeared to the Court of Appeals to be imminent. One searches the record in vain to find justification for this conclusion:

> "Where both the audience and the speaker are rapidly proceeding toward an eruption of civil strife—where indeed, both seem to be working up to a pitch where serious disorder might well be expected—the power and duty of the State to punish the speaker who refuses to desist after appropriate warning, is clear" (R. 159).

We are constrained to believe that this conclusion, unsupported by the record is more disturbing because of its restrictive character, than the words uttered by the petitioner on the night of March 8th. Some might conclude that the "angry muttering," the discussion "pro and con," the mild amount of "pushing and shoving," referred to above, might lead to "an eruption of civil strife." If conclusions of this nature are to serve as guideposts in the field of free speech, then indeed speech is far from free. See also our discussion of the hostile audience, *supra*.

Additional comment on the statement of the Court of Appeals that, "the power and duty of the state to punish the speaker who refuses to desist after appropriate warning, is clear" (R. 159) is unnecessary.

We cite it as additional proof of the Court's preoccupation with the belief that a meeting may be lawfully broken up without arrest, and that the refusal of the speaker to desist is sufficient grounds for his arrest. With this point of view, we have several time d' agreed. We maintain that, the speech of the petitioner being lawful, the police had no right to break it up, and that their request to the speaker to stop, being unlawful, could not give rise to an arrest.

### E. A PROVOCATIVE SPEECH IS NOT UNLAWFUL

The Court of Appeals continued, "we do not think, under those circumstances, that defendant had a constitutional right to disregard the police officer's word of warning with impunity and to continue to blare out his provocative utterances over loud speakers to a milling, restless throng composed of hostile and sympathetic listeners" (R. 159).

Here again, the Court of Appeals seeks to reduce freedom of speech to the freedom to talk about unprovocative subjects, and not, as this Court has said in *Board of Education* v. *Barnette*, 319 U. S. 624, 642: "Freedom to differ is not limited to things that do not matter much."

That there was a small amount of "milling and restlessness" and that the audience was "hostile and sympathetic" may be conceded, without admitting that same took place. Speaking to such an audience requires no apology. See *Terminiello* v. *City of Chicago, supra.*

### F. MOTIVES OF POLICE ARE IMMATERIAL

The Court of Appeals concluded it was bound by the finding of the Trial Court, "that the officer was motivated solely by a proper concern for the preservation of order and the protection of the general welfare . . ." (R. 160). We do not regard the motive of the police officer as an important factor. In our view, it is the function of the Court, not to determine his motive, though it be eminently pure, but to determine whether or not, on the evidence, there was justification for his act.

The Court of Appeals does give some recognition to this factor when it couples its finding of motivation with the following justification:

> ". . . in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community" (R. 160).

We have discussed several times, the condition of traffic in the area of the meeting. We have brought to the attention of this Court, that, by the police officer's own testimony, no more than ten pedestrians were discommoded (R. 32, 33), and that not a single motor vehicle, other than that of one of the police officers, was remotely interfered with (R. 49). The Court of Appeals did not refer to this as an imminent or possible interference with traffic. It called it specifically "an actual interference with traffic" (R. 160). This is not supported by the record.

Insofar as "an imminently threatened disturbance of the peace of the community" (R. 160) is concerned, this is answered by the Court of Appeals in the next paragraph of its opinion. "The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions." (R. 160).

The record, though it contains such phrases as, "milling around," (R. 50); "some pushing and shoving, but not to excess" (R. 41); "angry muttering, meaning pro and con discussion" (R. 41), does not support a finding that a disturbance was "imminently threatened." We hesitate to indulge in further argumentation on this score. We merely restate that the record is equally filled with references to "there was no disturbance" (R. 41); "no fighting" (R. 60); "the people were standing around listening to the speech" (R. 49, 50), "the crowd was quiet" (R. 26).

Completely unsupported by the record is the finding of the Court of Appeals that, "the speaker (was) deliberately agitating and *goading the crowd* and the police officers to action." (Emphasis ours.) (R. 160.) We have previously discussed the subject of "goading the police officers." We find nothing in the decision of the Trial Judge to indicate a finding that the speaker "goaded" the crowd to action (R. 140). The testimony of the police officers, if we may

be permitted further repetition on this subject, is that the petitioner urged his audience to "rise up and fight for equal rights for Negroes" (R. 52). If this is goading, perhaps so. None the less, as has been amply demonstrated, advising, counseling, goading, if you will, into a course of action, so long as this course of action is lawful, is protected by the Constitution. *Thomas* v. *Collins, supra.*

The Court of Appeals disposed of the *Terminiello* case in its concluding paragraph. In the view of the Court of Appeals, the *Terminiello* case was mistakenly relied on by the petitioner for the reason that, "it there appeared that the speech of Terminiello was delivered in a private hall or auditorium and not upon the public street" (R. 160). We are not aware that the *Terminiello* decision may be so limited. According to the dissenting opinion of Mr. Justice Jackson, the auditorium, at which Terminiello spoke, was filled with over eight hundred persons. Outside the auditorium, a crowd of over one thousand persons was gathered to protest against the meeting. Terminiello addressed the audience (the address is set forth at length in the opinion of Mr. Justice Jackson) along the following lines:

> "Fellow Christians and I suppose there are some of the scum got in by mistake, so—I want to tell a story about the scum:—Now, this danger which we face—let us call them Zionist Jews, if you will, let's call them Atheists, Communist, Jews or Zionist Jews—. It is the same kind of tolerance, if we said there was a bed bug in bed, "we don't care for you", or if we looked under the bed and found a snake and said, "I am going to be tolerant and leave the snake there." We will not be tolerant of that mob out there: We are not going to be tolerant any longer."

During the course of the address, members of the audience responded with cries of, "yes, the Jews are all killers—murderers;" "if we don't kill them first they will kill us;"

"kill the Jews;" "dirty kikes." Outside the auditorium, violence and cat-calling occurred.

We hold no brief for the right of Terminiello to act and speak in this manner. We are not called upon for an opinion on this question. We do feel, that the admonition of the Court of Appeals, that the petitioner, "so inflamed and agitated a mixed audience of sympathizers and opponents, that in the judgment of the police officers present, a clear danger of disorder and violence was threatened," (R. 161), would apply with great force to Terminiello.

We are aware of the principle upon which the *Terminiello* case was decided. In our opinion, this Court did not pass upon the right of Terminiello to act and speak in the manner above described. None the less, this Court, in the *Terminiello* decision, did say:

> "That freedom of speech . . . is nevertheless protected against censorship or punishment, unless *shown* likely to produce a *clear and present* danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest." *Bridges vs. California*, 314 U. S. 252, 262; *Craig vs. Harney*, 331 U. S. 367, 373. There is no room under our Constitution for a *more restrictive view.*" (Emphasis ours.)

### G. THE COURT WAS WRONG IN USING THE JUDGMENT OF THE POLICE OFFICERS AS A TEST

Although we regard the term "shown likely" to be more restrictive than the rule expounded in *Schenck v. U. S.*, 249 U. S. 47; ". . . whether the words used *create* a clear and present danger," (Emphasis ours), nevertheless, never has this Court said that "clear and present danger," is determined by "the judgment of the police officers present" (R. 161). It is our understanding that "clear and present danger" is "shown likely" to be produced by the evidence, and not by "the judgment of the police officers." This

Court has said in the *Terminiello* case, "there is no room under our Constitution for a more restrictive view." See also the opinion of Judge Sanborn for the Court of Appeals for the 8th Circuit in *Sellers* v. *Johnson*, 163 F. 2nd, 877, 881, on the relationship between liberty under the First Amendment and the possibility of disorder:

> "The theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community, that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed is interesting, but somewhat difficult to accept. Under such a doctrine, unpopular political, racial and religious groups might find themselves virtually inarticulate. Certainly the fundamental rights to assemble, to speak and to worship cannot be abridged merely because persons threaten to stage a riot or because *peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised*" (Emphasis ours).

If, for no other reason, this decision of the Court of Appeals of the State of New York should be struck down on that account.

In *Board of Education* v. *Barnette, supra*, at pages 638, 639 Mr. Justice Jackson said:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of* majorities and *officials* and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (Emphasis ours.)

II. THE COURT APPLIED THE RULE OF CLEAR DANGER RATHER THAN CLEAR AND PRESENT DANGER

Finally, we do not accept as valid, the Court of Appeals reference to a "clear danger of disorder and violence" (R. 161). The danger must be clear and present. Being clear alone will not suffice. As Mr. Justice Brandeis explicitly said in *Whitney* v. *California*, 274 U. S. 357, 376, "to justify suppression of free speech . . . there must be reasonable ground to believe that the danger apprehended is imminent." This is indicative of the fact that the words incorporated in the clear and present danger doctrine by the *Schenck* case, each have a meaning. There is no authority under our Constitution for the Court of Appeals to adopt "a more restrictive view." See *Terminiello* v. *Chicago*, *supra*.

In *Bridges* v. *California*, *supra*, the Court, after reviewing the cases which have applied the clear and present danger test, stated at page 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

In *Craig* v. *Harney*, 331 U. S. 367, 376, the Court pointed out that: "the danger must not be remote or even probable; it must immediately imperil." Moreover, there must be a

"solidity of evidence" (*Pennekamp* v. *Florida*, 328 U. S. 331), and the prosecution must prove beyond "a reasonable doubt", that the exercise of the First Amendment right leads to a clear and imminent danger of a substantive evil, within congressional power. *Hartzel* v. *U. S.*, 333 U. S. 680.

The Court of Appeals thus rejected the fundamental principle of the First Amendment, that liberty of expression, except in certain narrowly defined circumstances is no menace, but a democratic safeguard.

## IV. Section 722 of the Penal Law of the State of New York as Applied to the Petitioner, Fails to Provide an Ascertainable Standard of Guilt in Violation of the Fourteenth Amendment of the Constitution of the United States.

In denying petitioner's motion to dismiss at the close of the prosecution's case, the Trial Judge expressed his theory of the legal rule applicable to the street meeting and petitioner's speech as follows: "The basis of the action here is not whether or not disorderly conduct actually occurred, but whether or not the circumstances furnished the occasion for a probable act or acts that would come within the classification of disorderly conduct . . . if the combination of these things created a situation wherein the officers concluded that there was danger that a situation *might* arise that *could* involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try and head off any such development as that" (R. 71). (Emphasis ours.)

A substantially similar standard was employed by the Trial Judge in finding petitioner guilty at the close of the entire case (R. 139, 140).

The Court of Appeals by its affirmance, upheld this supposed standard of guilt employed by the Trial Judge. This construction and application of Penal Law, Section 722 by the Courts below, must be regarded for constitutional purposes, as incorporating this "standard of guilt," applied by the Court below, into the statute. *Terminiello* v. *City of Chicago*, 337 U. S. 1; *Winters* v. *New York*, 333 U. S. 507, 514.

It is clear that the statute, as thus construed and applied below to convict petitioner, deprived petitioner of his right to procedural due process under the Fourteenth Amendment of the Constitution of the United States as defined in a long line of Supreme Court decisions. This Court has repeatedly enunciated the established principle that a penal statute which does not establish a clear, unambiguous and ascertainable "standard of guilt" denies due process of law. *Connolly* v. *General Construction Co.*, 269 U. S. 385; *Small* v. *American Sugar Refining Co.*, 267 U. S. 231; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81; *Lanzetto* v. *New Jersey*, 306 U. S. 451.

The most recent decisions of this Court further emphasize that a vague and indefinite statute in the constitutionally preferred area of freedom of speech, press and association is void "on its face." *Winters* v. *New York*, 333 U. S. 507; *U. S.* v. *CIO*, 355 U. S. 104. This Court has held that "it is settled that a statute so vague and indefinite in form and as interpreted, as to permit within the scope of its language, the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment." *Stromberg* v. *California*, 283 U. S. 359, 365; *Herndon* v. *Lowry*, 301 U. S. 242, 258.

"Failure of a statute limiting free speech to fair notice of what act will be punished and such a statute's inclusion of prohibitions against expressions protected by the principles of the First Amendment, violates the accused rights

under procedural due process and freedom of speech and press." *Winters* v. *New York*, 333 U. S. 507, 509.

By the affirmance of the petitioner's conviction by the Court of Appeals, any person henceforth addressing a public assemblage of any kind on a controversial issue must do so at his peril, for he can have no possible way of knowing whether some police officer, disapproving of his remarks may conclude that, "the circumstances furnished the occasion for a probable act or acts what would come within the classification of disorderly conduct." (R. 71), and whether there exists, "a danger that a situation might arise that could involve disorderly conduct" (R. 71).

Such a vague and nebulous standard of guilt brings the statute as interpreted and applied below, within the condemnation of the above decisions of this Court and constitutes a denial of due process in violation of the Fourteenth Amendment.

## Conclusion

The petitioner is a Syracuse University student, under sentence of thirty (30) days in prison. His "offense" is that he exercised his right to speak his mind free and openly. He spoke out against conditions which mattered a great deal to him. He denounced the authorities of the community in wheih he was then living, for refusing to permit a speaker of his choice to speak in a public auditorium. He condemned the authorities of this community for permitting racial discrimination to exist. He urged both Negroes and Whites to join together in a course of action which would tend to eliminate these conditions. That perhaps, was his real "offense".

Though it is important that this young University student, as a result of his speech on the night of March 8, 1949,

was expelled from the University, and suffered a conviction and a sentence of thirty (30) days imprisonment, of far overriding importance are the consequences of this act on the civil liberties of people all over this Nation. Today it is a much too frequent occurrence that people are denied the right to meet on the streets of their community to discuss a subject of interest to them and their fellow citizens. Too often, having been denied the right to meet and speak, they are similarly denied the right to meet to protest the denials of these rights. All over this Nation, local communities are using their obligation to maintain peace and quiet as an excuse to suppress the discussion of unpopular doctrine. To date, the heavy hand of local legislative and law enforcement bodies has not been stayed as it descends to crush free discussion on the streets and in the parks of their cities, towns and villages.

The issue here, then, is not merely whether the petitioner shall remain expelled from his university status and whether he should go to jail for thirty (30) days, but whether our traditions of due process of law and freedom of speech and assembly will be vindicated before the people of this Nation. The issue is, in the words of Mr. Justice Murphy in *Martin* v. *City of Struthers*, 319 U. S. 141, 151, whether: "Freedom of (speech) has a higher dignity under the Constitution that municipal or personal convenience. In these days, free men have no loftier responsibility than the preservation of that freedom. A Nation dedicated to that ideal will not suffer, but will prosper in its observance."

So, too, apply the words of Mr. Justice Cardozo: "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in Constitutions, and conse-

erating to the task of their protection a body of defenders." Cardozo, The Nature of the Judicial Process 92 (1921).

We submit this case in the words of this Court in *Chambers v. Florida*, 309 U. S. 227, 241: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution —of whatever race, creed or persuasion."

We ask this Court to extend to this young university student the rights under our Constitution which have until now been denied him. We submit that this Court should reverse the judgment below and direct that the information be dismissed.

Respectfully submitted,

SIDNEY H. GREENBERG,
*Attorney for Petitioner;*
*Office & P. O. Address:*
*715 State Tower Bldg.,*
*Syracuse 2, New York.*